***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 76-1267

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

WILLIAM RODMAN and WILLIAM ROSENBERG,

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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# BRIEF FOR APPELLANTS

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## Questions Presented

1. Whether the Government failed to prove beyond a reasonable doubt that the defendants intended and agreed to use the mail in violation of the federal mail fraud and securities fraud statutes.

2. Whether the verdict is contrary to the weight of the evidence and is supported by substantial evidence.

3. Whether the District Court erred in ruling inadmissible conversations between the witness and the Appellant William Rodman, which statements were offered on the issue of Rodman's state of mind.

4. Whether the Appellants were denied a fair trial by reason of the trial court abusing its discretion and arbitrarily permitting the Government rebuttal on the day following the conclusion of the Appellants closing argument.

5. Whether by discussing the truthfulness of Ken Noonan's testimony with that witness while he was still under oath and still subject to cross examination the prosecutor failed in his duty to refrain from improper methods calculated to produce a wrongful conviction and tainted the entire trial.

Statement Pursuant To Rule 28 (3)

Preliminary Statement

This is an appeal by William Rodman and William Rosenberg from a judgment of the United States District Court for the Southern District of New York (The Honorable Lee Gagliardi) rendered on May 28,1976, after a jury trial convicting the Appellants of having conspired to violate Title 15,United States Code, Sections 77q, 77x, 78j (b) and 78ff of the Securities law and Title 18 United States, Code Section 1341, the mail fraud statute, in violation of Title 18, United States Code, Section 371. The Appellant, William Rodman, was sentenced to fifteen months imprisonment, all suspended except for four months and thirty six months probation to run concurrently with the fifteen month sentence. The Appellant William Rosenberg, was sentenced to fifteen months imprisonment, all suspended except for four months and thirty six months probation to run consecutively after completion of the fifteen month sentence. The Appellants are now free on $25,000 personal recognizance bonds executed by each Appellant pending the prosecution of this appeal.

During the trial the Appellant William Rosenberg was represented by Louis R. Aidala, Esq. Morton Berger, Esq; has been retained by the Appellant for purposes of this appeal and a substitution of attorney has been filed with the Court.

Morton Berger was counsel to the Appellant William Rodman

during the trial and has been retained by Appellant for purposes of this appeal.

Statement of Facts

The Appellants were charged in a one count indictment with having conspired with each other to violate Title 15 United States Code, Sections 77q, 77x, 78j (b) and 78ff and Title 18, United States Code, Section 1341. The indictment did not allege any substantive crime as there was no use of the mail in furtherance of the alleged conspiracy.

In substance, the indictment alleged that as of December 3,1975, the Appellant William Rosenberg accumulated 150,000 shares of Franklin Properties common stock. That from on or about November 1,1975, up to and including December 8,1975, the Appellants Rodman and Rosenberg conspired to violate the Securities laws and mail fraud law by manipulating the price of Franklin Properties Common stock to One ($1.00) Dollar a share and then paying James Kenneth Noonan, a broker,Fifty ($.50) cents a share cash bribe for each share of Franklin Properties stock he sold to his customers.

The Government's Case

WITNESS- LEWIS SCALA

Lewis Scala had been employed by John Maher Associates as a registered representative and cashier for approximately a year and three months. (T. pg. 35)* His function as cashier is to assure

*Refers to trial transcript.

that all securities bought and sold for customers are properly delivered and executed to the buying broker or delivered to the customer for whom they were purchased. He testified that when John Maher Associates sells stock to another broker a confirmation is sent by mail. When asked "is it always by mail" he answered "I would say generally, yes. (T. p40-41)(Italics supplied). On cross examination, Mr. Scala testified that confirmations can be hand delivered and that John Maher Associates had hand delivered confirmations (T. pg 42).

Lewis Scala also testified that the defendant, William Rosenberg, was an employee of John Maher Associates and a trader at that firm. (T. Pg. 40).

WITNESS- JAMES KENNETH NOONAN

During November and early December, 1975, James Noonan was a salesman with Leyner Dreskin & Co; a stock brokerage firm. He was employed to solicit, buy and sell orders from the public for various securities. Sometime in the latter part of 1975, he had a phone conversation with the Appellant William Rodman and Rodman indicated that he was involved in a stock deal and wanted to know whether Noonan would be interested in participating. Noonan said he would be interested. No details were discussed . (T. pg 47-48).

On December 3,1975, Rodman telephoned Noonan at home and told him the details of the deal. He told Noonan that the name of

the stock was Franklin Properties and that it was about $1.00 a share. Rodman told Noonan that for every share of stock Noonan induced his customers to buy, Rodman would see to it that Noonan got 50 cents a share in cash. Rodman told Noonan to check the market and call him back. Noonan checked the market and found that the stock was only about 50 or 60 cents a share. Rodman told Noonan not to worry and that the stock will be $1.00 a share when the time comes to buy. Noonan asked Rodman how he was going to get paid the 50 cents a share and Rodman said he would try to put him in touch with the party involved in the deal at a later date, and not to worry he would get paid. (T. Pg 50-53). Later that night or possibly after midnight, Noonan called Rodman and reviewed the previous conversation. The next morning Noonan called the United States Attorney's office and spoke to Assistant United States attorney John Lowe. Noonan told John Lowe what transpired with Rodman and asked him what to do. (T. Pg 53-54).

Rodman again called Noonan and gave him a phone number and told him to call the number and ask for Bill and to tell Bill that Rodman said to call him and he would explain anything further Noonan wanted to know about the deal. Noonan then called Bill and said that Rodman told him to call about the deal. They had a discussion about Franklin properties stock and how the stock would be a dollar and for every share Noonan bought, William Rosenberg would give him

50 cents in cash less 5% for laundering the money. Rosenberg told Noonan that as long as the buy orders could be directed to John Maher Associates, Noonan would be sure of purchasing the stock at a dollar (T. Pg 54-56).

On December 4,1975, Noonan called Rodman from a pay phone located at the United States Attorney's Office. The conversation was recorded and was admitted into evidence as Government Exhibit No. 4. Over the objection of defense counsel, the jury was permitted to have typed transcripts of the recorded conversation to read when the recording was played (T. Pg 53-61).

On December 5,1975, Noonan spoke to Rosenberg from a phone at the United States Attorney's Office. The conversation was recorded and the tape recording was admitted into evidence as Government Exhibit No. 5B. Again, there was defense objection to giving the jurors typed transcripts prepared by the government to use when listening to the recording (T. Pg. 63-65).

Noonan was asked whether when stock is sold to a customer at Leyner, Dreskin, does the customer receive a notice of that transaction. He responded that he receives a confirmation in the mail. Noonan was then asked "Is that the customary and ordinary practice at Leyner Dreskin with regard to sending confirmations to customers"? He answered: "I <u>believe</u> its the only way". (Italics Supplied) (T. Pg. 67).

On cross examination, Noonan was questioned about how he knew that Rodman would be in Binghamton, New York, on December 1, 1975 and where he would be staying in Binghamton, New York. Noonan answered that he didn't remember but that Rodman might have told him that he was going to Binghamton but that he did not tell him where he was staying. Noonan was then asked whether he called Rodman at his Spring Valley home to speak to him on December 1,1975 at 7:11 P.M. Noonan answered that he didn't remember. Noonan was then asked whether he recalled Rodman's wife answering the phone and he answered "I have spoken to his wife on the phone. I don't remember whether it was that day. I don't recall the days that I talked to him." When asked whether he recalled Mrs. Rodman telling him that her husband was in Binghamton and giving him the phone number, Noonan answered: "She might have but I don't remember." (T. Pgs. 82-84).

On cross examination of Noonan it was illicited that in 1973 he attempted to collect a debt from Rodman and threatened Rodman with a gun in an attempt to collect. That Noonan did not collect the money from Rodman and that he felt cheated and that he had animosity against Rodman. (T. Pg. 95-97, 109, 127-129). He further testified that during the time of his conversations with Rodman in November and December,1975, he knew that he was going to be a

government witness against Rodman in a pending criminal case in the United States District Court, and that his testimony would be damaging to Rodman. He discussed the pending matter with Rodman and Rodman was gravely concerned. Rodman knew that Noonan was going to be a witness against him (T. Pg 98-101).

Noonan was asked whether Rodman asked him for anything out of the deal. He answered that he didn't recall exactly what Rodman wanted. That he didn't know. Noonan was asked: "Did he say to you that he wanted anything out of the deal" Noonan answered: "He implied that he would like something, yes." Noonan was then asked: If Mr. Rodman was to be paying you, why would he be asking you for money." Noonan answered: "I figured he would get it from the other side and probably want something from me also." Noonan was asked: "Did he tell you he was getting anything from the other side" Noonan answered that "I assumed it". When Noonan was asked "Isn't it a fact that Mr. Rodman never promised to pay you anything" Noonan answered "He said I would get paid." (T. Pg. 90-91).

On the tape recording of the conversation between Rodman and Noonan which took place on December 4,1975, Government Exhibit No.4 Noonan says to Rodman, referring to Rosenberg, "And he's trying to give me like a half less five percent, you know, for somebody to do the checks or something like that." Rodman answered: "Well that's your business; that's why I said I don't wanna know, I dont wanna know from it; I really don't." Noonan continues by saying" I'm

you know, I 'm worried about getting paid from him. I just, you know-----" Rodman responds: "I wouldn't but I mean, again, you know, I don't, I certainly don't even want to be concerned, you know, I'd love to turn around and know something good happened, you didn't even have to do it."

Rodman never discussed with Noonan how many shares of Franklin Properties stock he could sell to his costumers and Rodman never told Noonan an amount to sell. (T. Pg. 112).

Noonan was cross examined concerning his recorded conversations with Rodman and Rosenberg on December 4th and 5th respectively, Government Exhibits Nos. 4 and 5B. On being asked why he asked Rosenberg whether Leon Nash was involved he answered"because he's a crook." Because I didn't want to be near anything he was involved with." "I didn't want to be even discussing anything with anybody that had anything to do with Leon Nash." (T. Pg. 113-114). Noonan was asked: "Mr. Noonan, in your telephone conversation with Mr. Rodman, December 4th, the one you recorded, you stated: "I'm worried about getting paid from him was that the truth?" Noonan answered: "yes". The questioning continued on this point and Noonan was asked: "You asked Mr. Rodman this question because you were going to rely on Mr. Rodman's judgment" Answer: "yes". (T.Pg. 114-115)

During luncheon recess, John Lowe, the assistant United States

Attorney trying the case, had a conversation with the witness concerning his testimony during cross examination by counsel for Rodman. At the time of this conversation, the witness Noonan was still subject to cross examination. After the luncheon recess, counsel for the defendant Rosenberg questioned Noonan about the conversation he had with the Assistant United States Attorney. Noonan testified that Mr. Lowe asked him the same questions concerning his reasons for asking Rosenberg and Rodman certain questions during the recorded telephone conversations. (T. Pg. 159-162). On redirect the government examined Noonan about his recess conversation with Mr. Lowe. Noonan was asked: "was there any conversation on the subject of truth." Noonan answered: "I seem to recall that, yes". Noonan was then asked: "What do you recall was said about that subject" Noonan answered" "you said just always tell the truth and that was it." Then Mr. Lowe illicited from the witness that his reason for asking the questions of Rodman and Rosenberg on the recorded conversations was to get some evidence. (T. Pg 196-198).

Noonan also testified during cross examination that he never told Rodman or Rosenberg that Leyner, Dreskin mails every confirmation. (T. Pg. 114).

WITNESS--ARTHUR PENDRICK

Arthur Pendrick was employed by John Maher Associates, Inc; and was president of the firm since January,1975 (T. Pg 386-387). He testified that the Company was a broker-dealer in securities which it buys and sells for its own account and the account of customers. He testified that William Rosenberg is employed as a trader by the firm. (T. Pg. 387).

On cross examination by counsel for Rodman, the witness was asked whether the firm ever sent a confirmation of purchases or sales other than through the mails. The witness answered that sometimes clients would come up to the firm and pick up their confirmation by hand. He testified that use of the mail was not essential to consummate the sale or purchase of securities. (T. Pg. 406-407).

Other witness called by the government testified as to matters which are not within the scope of this appeal.

Their testimony was offered to prove that the Appellant Rosenberg controlled shares of Franklin Properties stock through the use of nominees. Although much of the testimony was received over objection of defense counsel, the rulings on these particular objections are not set forth as issues in this appeal.

After the government rested its direct case the defendants

made motions for judgment of acquittal because the government failed to prove the essential elements of the crime. The motions were denied. (T. Pg. 541-542).

The Defense Case

WITNESS--ELAINE WINTER

Mrs. Elaine Winter was called as a witness for the Appellant Rodman. She testified that she was employed in the office of Morton Berger, attorney for Rodman. In November , 1975, she received a phone call at the office from an individual who identified himself as Ken Noonan. Noonan said it was urgent that he speak to Rodman; that he had information for him. He wanted to know how to get in touch with Rodman. Noonan called two or three times on the same day. She testified that Morton Berger was not in the office and she left a message for him. The following day she asked Morton Berger whether he called Noonan and was told that he had and had given Noonan, Rodman's phone number. She testified that she received the calls from Noonan on November 20,1975. (T. Pg. 549-551).

WITNESS--ROSEMARY RODMAN

Rosemary Rodman is the wife of the Appellant, William Rodman. In November, she overheard a telephone conversation between her

husband and a person he referred to as Ken. She heard her husband mention the word stock and say that he has not been involved in stock for years and that he does not want to be involved. He said he didn't know of any name and he didn't want any part of it and then he proceeded to begin talking about that he had property and he was involved in real estate. She said that her husband seemed very concerned or upset. He seemed very nervous. (T. Pg. 557-558).

The defense wanted to offer the conversation between Mrs. Rodman and her husband immediately following that phone call to show Rodman's state of mind. The court held it inadmissible. The defense excepted to the Court's ruling. (T. Pg. 556).

On December 1,1975, Mrs. Rodman received a phone call from an individual who identified himself as Ken Noonan. The phone conversation was objected to as Mrs. Rodman couldn't identify the voice of the caller. The objection was sustained and excepted to by the defense attorneys. (T. Pg. 558-559). Mrs. Rodman was then asked what she did after she had the phone conversation. She testified that she called her husband in Binghamton, New York and told him that she had given the Binghamton telephone number to a person who identified himself as Ken Noonan. The witness was then asked "What did your husband say to you at that time." An objection was made by the government and was sustained by the

court. Exception was taken by the defense. (T. Pg. 559-560).

After the testimony of Mrs. William Rodman and the introduction of certain Exhibits by stipulation, the defendant Rodman rested. (T. Pg. 562).

The defendant Rosenberg did not call any witness and he rested (T. PG. 464).

Both defendants renewed their motions for judgment of acquittal and the motions were denied. (T. PG. 564-565).

MISCELLANEOUS MATTERS

At three o'clock in the afternoon of March 29,1976, both sides had rested and the court addressed counsel with regard to closing arguments. (T. Pg 566). Each counsel said their argument would take between thirty and forty minutes and the Court reminded the government to cover everything on the first go-around and rebuttal should be really a brief rebuttal and not a re-summation or anything else. (T. Pg 566-657). After the government completed its summation, counsel for Rodman inquired of the Court whether everything would be completed, including rebuttal. The court said: "We had better finish the summations and the rebuttal tonight." At this point the government apologized for going long beyond the time predicted. The Court stated: "Well, we will take it off at the other end." (T. Pg. 611). Immediately thereafter, counsel

for Rodman did his summation. Upon completion of Rodman's summation, Mr. Aidala, counsel for Rosenberg asked the court whether the jury could stretch for one moment. The Court stated: "No we have had enough stretching." (T. Pg. 640) . Counsel for Rosenberg then did his summation. After this summation the Court stated "Our time table has gone completely askew. Would you prefer to wait for the morning? How many would prefer to wait until the morning for Mr. Lowe's rebuttal?" The jurors nodded affirmatively (T. Pg. 673). Counsel for Rosenberg and Counsel for Rodman both objected to the prosecutor being permitted to rebut the following day instead of immediately following the closing argument of defense counsel. It was approximately 6:15 PM when all closing arguments except rebuttal had been completed. The objections were overruled. (T. pg. 678-679)

Defense Exhibits:

Defendant Rodman's Exhibit C which is the phone bill of William Rodman for the period of November 22 through December 18,1975.

Government Exhibits:

Government Exhibit No. 2 is the home phone bill of James Kenneth Noonan. Government Exhibit No. 2B is the phone bill of a friend of James Kenneth Noonan whose phone Noonan used to make a call to Rodman.

INSTRUCTIONS

The defendants-appellants request to charge on the question of use of the mails was rejected by the court. The Appellants objected to the instruction given by the Court. (T. Pg. 744)

PROSECUTOR'S CONVERSATION WITH WITNESS JAMES KENNETH NOONAN WHILE HE WAS STILL UNDER CROSS EXAMINATION.

Counsel for Rosenberg asked the court what it intends to do about Mr. Lowe's speaking to the government's main witness in the middle of cross examination. Mr. Lowe responded in essence that he knew that the answers of the witness were not truthful and that his conversation with the witness was to cause the witness to be truthful (T. Pg. 242-244). The Court suggested that it will give an instruction to the jury that it is customary and the usual practice for an attorney not to talk with a witness while he is still under oath. Counsel for Rodman states he has no objection to the instruction (T. Pg. 250). The government objects to the instruction (T. Pg. 251-257). The court at the urging of the government decides to make no instruction and in addition denies the motion that had been made for mistrial. (T. Pg. 257).

POINT NO. 1

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANTS INTENDED AND AGREED TO USE THE MAIL IN VIOLATION OF THE FEDERAL MAIL FRAUD AND SECURITIES FRAUD STATUTES.

The Appellants were charged in the indictment with the crime of conspiracy to commit mail fraud and securities fraud. The indictment did not contain a substantive count of mail or securities fraud nor did the indictment allege any use of the mail.

Fra d is not a federal crime unless it is coupled with some proscribed act which confers federal jurisdiction. In the case at bar, at the election of the government, the proscribed act relied upon was use of the mail. As the proscribed act did not occur, the government had the burden of proving beyond a reasonable doubt that the appellants intended and agreed to use the mail. Guardalibini v. United States, 128 F. 2d. 984 (5th Cir. 1942); Mazurosky v. United States, 100 F. 2d. 958 (9th Cir. 1939); Burns v. United States 279 F. 982 (CCA. Okl. 1922); Morris v. United States, 7 F.2d.785 (CCA. Ark. 1925).

In mail fraud cases, it is the mailing of the count letter or other document that constitutes the basis of federal jurisdiction and proof of mailing is therefore an essential element of the crime of mail fraud. The government has the burden in such a

case to prove mailing beyond a reasonable doubt with competent evidence. United States v. Wolfson, 322 F. Supp. 798 (D.C. Del 1971); Bolen v. United States, 303 F. 2d. 870 (9th Cir.1962) Northcraft v. United States, 271 F. 2d. 184 (CCA. Mo. 1959); United States v. Berg, 144 F. 2d. 173 (CCA N.J. 1944); Whealton v. United States. 113 F. 2d.710 (CCA N.J. 1940; United States v. Herzig, 26 F. 2d. 487 (D.C. N.Y. 1928); United States v. Maza, 414 U.S. 395 (1974); Kann v. United States, 323 U.S. 88,94 (1944); United States v. Goldenberg, 455 F. 2d. 470 ( 9th Cir. 1972); United States v. Baker, 50 F. 2d.122 (2d. Cir. 1931); Rosenberg v. United States, 120 F. 2d. 965 (10th Cir. 1941); United States v. Browne, 225 F. 2d.751 (7th Cir. 1955); United States v. Jones, 174 F. 2d. 746 (7th Cir. 1949); United States v. Provoo, 215 F. 2d.531 (2d. Cir.1954).

However, the defendants were not charged with mail fraud but with the crime of conspiracy to commit mail and securities fraud. The substantive count of mail fraud must be distinguished from a charge of conspiracy which, being an agreement, requires proof of an intended use of the mails. Banister v. United States, 379 F. 2d. 750 (5th Cir.1967). The parties must agree upon all elements of the crime including the use of the mails. United States v. Cohen, 145 F. 2d. 82 (2d. Cir.1944); Farmer v.

United States, 223 F. 903 (2d. Cir. 1915); Mazurosky v. United States, Supra; Guardalibini v. United States, Supra; Blue v. United States, 138 F. 2d. 351 (6th Cir.1943); Banister v. United States, Supra; Schwartzberg v.United States, 241 F. 348 (2d Cir. 1917); Raffe v. United States, 65 S. Ct. 553, 323 U.S. 799 (1944).

On a charge of conspiracy to violate the mail fraud statute, the government must sustain a heavier burden of proof as to the intent of the conspirators to defraud by the use of the mails then the burden the government must sustain in order to prove the substantive charge of mail fraud. Blue v. United States, Supra; Clark v. United States, 64 S. Ct. 1046. 322 U.S. 736 (1943); Pardee v. United States, 64 S. Ct. 1046, 322 U.S. 737 (1943); Farmer v. United States, Supra; Morris v. United States, Supra.

This is perfectly consistent with the holding of the Supreme Court in the case of United States v. Feola, 420 U.S. 671 (1975). The Feola case involved Title 18 United States Code, Section 111 and contained both a conspiracy count and a substantive count. The statute makes it a federal crime to assault a federal officer while engaged in or on account of the performance of his official duties. The proscribed act is to assault a federal employee. A federal officer was in fact assaulted. The defendant contended that his conviction for conspiracy should be reversed as there was

insufficient evidence to prove that he knew the person assaulted was in fact a federal employee. The court held that as the substantive statute did not require a specific intent to assault a federal officer, no greater scienter requirement can be engrafted upon the conspiracy offense, which is merely an agreement to commit the act proscribed by Section 111. (Italics Supplied).

The court held that as the substantive offense was actually committed the government need not prove a specific intent to assault a federal officer in order to sustain its burden on the conspiracy count. Proof of intent to assault was sufficient as the victim of the assault was in fact a federal officer. The Court in referring to the conspiracy statute stated:

> "A natural reading of these words would be that since one can violate a criminal statute simply by engaging in the forbidden conduct, a conspiracy to commit that offense is nothing more than an agreement to engage in the prohibited conduct. Then where, as here, the substantive statute does not require that an assailant knew the official status of his victim, there is nothing on the face of the conspiracy statute that would seem to require that those agreeing to the assault have a greater degree of knowledge." (Italics Supplied)

However, the Feola court did not hold that knowledge of the identity of the intended victim is always irrelevant. On the contrary, the court stated:

> "Again we point out, however, that the state of knowledge of the parties is not always irrelevant in a proceeding charging a violation of conspiracy law. First, the knowledge of the parties, is relevant to the same issues and to the same extent as it may be for conviction of the substantive offense. Second, whether conspirators knew the official identity of their quarry may be important, in some cases, in establishing the existence of federal jurisdiction. The jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is when a federal officer is attacked."(Italics Supplied)

In the case at bar the substantive offense was not committed. The government thus had the burden of proving facts to establish the existence of federal jurisdiction. To establish federal jurisdiction, the agreement must be fairly characterized as one calling for use of the mail to accomplish its goals. This is consistent with the position taken by the Feola court where the court stated:

> "Where, however, there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. If the agreement calls for an attack on an individual specifically identified, either by name or some unique characteristic, as the punative buyers in the present case, and that specifically identified individual is in fact a federal officer, the agreement may be fairly characterized as one calling for an assault upon a federal officer, even though the parties were unaware of the victims actual identity and even though they would not have agreed to the assault had they known that identity."(Italics Supplied).

The remaining question is whether the proof offered by the government was sufficient so that the conspiratorial agreement could be fairly characterized as one calling for the use of the mail to accomplish its goals.

The test to determine the sufficiency of evidence with regard to proof of an intent and agreement to use the mail was set forth in Farmer v. United States, Supra, where the court stated:

> "Usually when the scheme is unfolded it is apparent that it could not be carried out without the use of the mails and a jury is therefore warranted, without further proof, in drawing the inference that those who devised the scheme intended to use the mails." (Italics Supplied)

The issue as presented in the Farmer case is whether the scheme could have been carried out without the use of the mails. There was no evidence offered by the government to show that the nature of the scheme was such that it could not be carried out without the use of the mails.

In the case of Mansfield v. United States, 155 F. 2d. 952 (5th Cir. 1946), the scheme involved was the selling of Texas land to residents of California. Deeds had to be sent through the mail and recorded in Texas and then mailed by the recording clerk in Texas back to California. The Court held that the defendants had the requisite specific intent to use the mail as the scheme could not have been carried out without the use of the mails. (Italics Supplied). The court stated:

> "It is the rule that where the accomplishment of the conspiracy contemplates the use of the mails and such is essential to the execution of the scheme, intent on

> the part of the conspirators to use the mails may be inferred." (Italics Supplied).

The court went on to state that the use of the mails was indispensable in carrying out the scheme. See also Blue v. United States, Supra.

In the case of Banister v. United States, Supra, the nature of the scheme was such that the defendants knew that certain fraudulent insurance claims had to be filled out in the State of Florida, filed with the local agent of the Insurance Company and mailed by the local agent in Florida to the home office of the Insurance Company in New York. The court held that the defendants had the requisite specific intent to use the mail as the use of the mail "would be required as an integral part of the scheme." (Italics Supplied).

In the case of Schwartzberg v. United States, Supra; the mail was extensively used in the execution of the fraud. The court reversed the defendant's conviction on the conspiracy count citing the Farmer case. Although the mails were used extensively in the execution of the scheme, its use was not an integral part of the scheme to defraud. The Court held that the intent which was held necessary in the Farmer case was not proven by direct evidence and could not be inferred beyond a reasonable doubt. It is therefore

evident that the use of the mail in the execution of the scheme to defraud does not by itself create an inference that the defendants agreed nnd intended to use the mail.

In the case of United States v. MacNamara, 91 F. 2d. 986 (2d. Cir. 1937), the Court stated that the offense of conspiracy to use the mails to defraud consists of a scheme devised or intended to be devised and use of the mails in execution or attempted execution thereof. (Italics Supplied). From the holding in the MacNamara case, it would follow that there cannot be a conviction for conspiracy to commit mail fraud without actual use of the mail in furtherance of the scheme and artifice to defraud. The Appellants do not ask this court to go that far.

From the foregoing cases it is manifest that before it can be inferred beyond a reasonable doubt that the Appellants intended and agreed to use the mail in furtherance of the scheme to defraud, the government must introduce evidence showing that the scheme could not be carried out without the use of the mails or that the use of the mails was essential or indispensable to the execution of the scheme. The case of United States v. Feola, Supra, did not overrule these decisions nor did it address itself to the sufficiency of evidence to prove a conspiracy to commit mail fraud. The government had the burden of introducing evidence to show that the nature of the scheme was such that the use of the

mails was essential to its accomplishment. The evidence introduced by the government concerned one transaction between two brokers, both of whom were situated in the City of New York. This is not proof that use of the mail was essential or indispensable to effectuate the scheme. That the use of the mail was essential or indispensable to the execution of the scheme may be established by direct or circumstantial evidence but it may not be inferred where no evidence has been introduced to prove the fact. An inference of fact which is essential to the establishment of the offense cannot be rested upon another inference. Conviction cannot be predicated upon one inference pyramided upon another. Presumption cannot be super imposed upon presumption and thus reach the ultimate conclusion of guilt. United States v. Ross, 92 U.S. 281 (1876); Vernon v. United States, 146 F. 121 (8th Cir. 1906); Brady v. United States, 24 F. 2d. 399 (8th Cir. 1928); Rosenberg v. United States, Supra; United States v. Dondich 506 F. 2d. 1009 (9th Cir. 1974). The government simply failed to introduce the evidence required by Farmer v. United States, Supra and its progeny.

The government has failed to offer any evidence regarding the scope of the scheme from which it would appear that the scheme to defraud could not be carried out without the use of the mails. There was no evidence to show that the use of the mails was essential or indispensable to the execution of the

scheme. There was no evidence upon which to predicate an inference that the Appellants agreed and intended to use the mails in the execution of the scheme. The government failed to prove that the Appellants agreed and intended to use the mail.

The government has attempted to meet its burden of proof by showing custom and practice with regard to use of the mail by both Leyner, Dreskin and John Maher Securities. If there had been a substantive count of mail fraud in the indictment, proof of an invariable custom or practice of mailing in the regular course of business with evidence of the letter appearing in the customary channel of mail matter is enough to carry the question to the jury of whether a letter was actually mailed. Masters v. United States, 229 F. 2d. 677 (6th Cir. 1956); United States v. Barnette, 91 F. 2d. 677 (6th Cir. 1956); United States v. Wolfson, Supra. However,this is insufficient with regardto the conspiracy count where the indictment does not allege a mailing and substantive count as it does not meet the standard of proof required to prove intent to use the mail as set forth in the case of Farmer v. United States, Supra, and its progeny.

Furthermore,the proof offered by the government would be insufficient even if it were offered to prove use of the mail as a substantive offense. None of the government witnesses testified as to an "invariable" custom, usage and practice to use the mail. The witness Lewis Scala, cashier of John Maher Associates

testified on cross examination that John Maher Associates had hand delivered confirmations (T. Pg. 42). Arthur Pendrick, president of John Maher Associates testified that sometimes clients would come up to the firm and pick up their confirmations by hand. He testified that use of the mail was not essential to consummate the sale or purchase of securities. (T. Pg. 406-407)

James Kenneth Noonan testified that he "believed" that Leyner, Dreskin only sent confirmations by mail (T. Pg. 67) (Italics Supplied). Noonan was a registered representative at Leyner, Dreskin and was employed there for a total of about one month. He was not employed in or in charge of the mail room or delivery of securities. Testimony as to the business custom, usage and practice of particular brokerage firm with regard to the mailing of confirmations must be introduced through a witness who is in charge of the particular procedure followed by the firm. Stevens v. United States, 306 F. 2d. 834 (5th Cir. 1962); Decker v. United States 140 F. 2d. 378 (4th Cir. 1944.).James Kenneth Noonan was not in charge of the mailing procedures at Leyner, Dreskin and was therefore not the proper witness to testify as to the firm's custom, usage and practice. Furthermore, the government failed to establish a proper predicate as to Noonan's knowledge of the firm's custom,usage and practice of mailing confirmations. Lastly, Noonan's testimony was a statement of opinion and was a conclusion. He testified as to his belief which is different than testifying as to the

fact sought to be proven. Furthermore, he testified that he did not tell Rosenberg or Rodman of the practice of Leyner, Dreskin of mailing all confirmations. Thus, there was no proof that either Appellant had knowledge of this business custom,usage and practice of Leyner, Dreskin. Without proof that the Appellants had knowledge of the business practice it cannot be inferred that they should have foreseen the use of the mail. Thus, the government evidence would have been insufficient to prove mailing had there been a substantive count with proof of mailing in issue.

The element which distinguished this case from frauds subject only to State prosecution is missing from the proof. United States v. Dondich, Supra. The element of intent to use the mail cannot be inferred simply because communications are ordinarily sent by mail. To do so would in effect change the federal mail fraud statute to the federal fraud statute. This was not the intent of Congress.

POINT NO. 2

THE VERDICT IS CONTRARY TO THE WEIGHT OF THE EVIDENCE AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The government had the burden of proving beyond a reasonable doubt that the Appellants Rodman and Rosenberg conspired with one another to violate the federal mail fraud and securities laws. There is no contention by the government that either Rodman or Rosenberg conspired with James Kenneth Noonan.

The evidence viewed in the light most favorable to the government shows that Rodman introduced Noonan, a government informer, to Rosenberg so that Rosenberg and Noonan could participate with one another in the fraudulent sale of Franklin Properties stock. There was evidence that Rodman assured Noonan that he would be paid by Rosenberg. There was no evidence offered either how or whether Rodman would otherwise participate or share in the proceeds of the stock transaction between Rosenberg and Noonan.

Noonan was an informer. He was not named in the indictment as a co-conspirator nor does the government claim he was a co-conspirator. The conversations between Rodman and Noonan and between Rosenberg and Noonan cannot be considered as part of the conspiracy or in furtherance of the conspiracy. One cannot conspire with a government informer who secretly intends to frustrate the conspiracy. Sears v. United States, 343 F. 2d.

139 (5th Cir. 1965); United States v. Chase, 372 F. 2d. 453 (4th Cir. 1967); O'Brien v. United States, 51 F. 2d. 674 (7th Cir. 1931).

The testimony of the informer, Noonan, is admissible and probative only as independent evidence to prove that a conspiracy existed between the Appellants Rodman and Rosenberg. In determining whether a particular defendant was a member of conspiracy, if any, only his acts and statements should be considered. He cannot be bound by the acts or declarations of the participants until it is established that a conspiracy existed and that he was one of its members. United States v. Gillette, 189 F. 2d. 449 (2d. Cir. 1951); United States v. Pellegrino, 273 F. 2d. 770 (2d Cir. 1960). Although direct evidence is not necessary to prove participation of an accused in a conspiracy, that connection must be proved from such non-hearsay facts in evidence as legitimately tend to sustain that inference. United States v. Manton, 107 F. 2d. 834 (2d. Cir. 1940); United States v. Potash, 118 F. 2d. 54 (2d. Cir. 1941).

To conspire is to agree, and the presence of an agreement is the primary requirement for the establishment of a conspiracy. Asquill v. United States, 60 F. 2d. 780 (4th Cir. 1932); Tinsley v. United States, 43 F. 2d. 1890 (8th Cir. 1930); Linde v. United States, 13 F. 59 (8th Cir. 1926).

The agreement may be shown if there be concert of action, all of the parties working together understandingly with a single design for the accomplishment of a common purpose. United States v. Borelli; 336 F. 2d. 376 (2d. Cir. 1964). United States v. Varelli, 407 F. 2d. 735 (7th Cir. 1969); Thomas v. United States, 398 F. 2d. 531 (5th Cir. 1968). Lacking agreement, neither association with conspirators or knowledge of law violation is itself sufficient to make the defendant a conspirator. United States v. Kompinski, 373 F. 2d. 429 (2d. Cir. 1967); United States v. Armone, 363 F. 2d. 385 (2d. Cir. 1966).

The sole witness against Rodman was James Kenneth Noonan. He testified that Rodman told him about the Franklin Properties stock deal on December 3,1975. Rodman said that for every share of Franklin Properties stock Noonan sold to a customer he would see to it that Noonan would get 50 cents a share in cash. Noonan asked Rodman how he was going to get paid the 50 cents a share and Rodman said he would try to put him in touch with the party involved in the deal at a later date, and not to worry, he would get paid (T. Pg 48-53). Rodman again called Noonan gave him a phone number and told him to call a person named Bill and tell him that Rodman said to call and he would explain anything further Noonan wanted to know about the deal (T. Pg. 54). On cross examination of Noonan, he testified that Rodman didn't know the

price of Franklin Properties stock (T. Pg. 86-87); Noonan didn't know whether Rodman was getting anything out of the deal, he just assumed he was getting something. Rodman never asked Noonan for anything out of the deal but he implied that he would like something; (T. Pg. 90-91); Noonan never discussed with Rodman the number of shares of stock his customers could purchase (T.Pg 112); Rodman never promised to pay Noonan but he told Noonan that he would get paid (T. Pg. 90-91).

Government Exhibit No. 4 which is the recording made of the phone conversation of December 4,1975 between Rodman and Noonan contradicts very material parts of Noonan's testimony. Government Exhibit No. 4 shows that Rodman did not want to be involved in the deal. When Noonan tells Rodman what Rosenberg wants to pay him, Rodman answers:

> "Well that's your business, that's why I said I don't wanna know, I don't wanna know from it; I really don't."

When Noonan says that he's worried about getting paid from Rosenberg, Rodman answers:

> "I wouldn't, but I mean, again, you know, I don't, I certainly don't want to even be, you know, I don't even want to be concerned, you know, I'd love to turn around and know something good happened, you didn't even have to do it."

It is obvious from Government Exhibit No 4. that Rodman didn't

want any part of the deal and had just put Noonan and Rosenberg together. Rodman was interested only in Noonan and Rosenberg having an understanding and the recording shows that the understanding had to be negotiated between Noonan and Rosenberg.

At most, Rodman introduced Noonan to Rosenberg and helped them reach an understanding. The evidence fails to establish that any agreement existed between Rodman and Rosenberg to advance a joint interest or common goal. The act of introducing the parties even coupled with the act of helping them to negotiate their deal does not establish that an agreement existed between Rodman and Rosenberg. There was no evidence offered by the government, either direct or circumstantial, that Rodman and Rosenberg had mutual or common goals. Without proof of this fact, the government has failed as a matter of law to prove the existence of a conspiracy between Rodman and Rosenberg as alleged in the indictment. Rodman may have supplied Rosenberg with an individual who was needed by Rosenberg to achieve his goal of selling Franklin Properties stock to the public. In United States v. Falcone, 311 U.S. 205, 61 S. Ct. 204 (1940), the Supreme Court held that the supplying of sugar to an illicit distiller, with knowledge that the buyer will use the merchandise in furtherance of a conspiracy was insufficient to make the seller a co-conspirator. The same rationale applies in the case at bar. The

fact that Rodman supplied Rosenberg with an essential ingredient in his plan to sell Franklin Properties to the public, even with knowledge of Rosenberg's fraudulent intent, without proof that there was an agreement to advance a common goal or purpose is insufficient to make Rodman and Rosenberg Co-conspirators. One must have a stake in the success of the conspiracy in order that he may be considered a party to the conspiracy. United States v. Di Re, 159 F. 2d. 818 (2d Cir.1947). Evidence establishing knowledge of another's criminal activity and an aiding of it does not of itself establish conspiracy. United States v. Krol, 374 F. 2d. 776 (7th Cir. 1967).

For the foregoing reasons, the government failed as a matter of law to prove that the Appellant Rodman conspired with the Appellant Rosenberg. As Rodman and Rosenberg were the sole alleged conspirators, the judgment of conviction must be reversed as to both Appellants.

POINT NO. 3

THE DISTRICT COURT ERRED IN RULING INADMISSIBLE CONVERSATIONS BETWEEN THE WITNESS AND THE APPELLANT WILLIAM RODMAN, WHICH STATEMENTS WERE OFFERED ON THE ISSUE OF RODMAN'S STATE OF MIND.

To establish criminal conspiracy, corrupt motive or intent must be shown and there must be an evil design or wrongful purpose. Mackreth v. United States, 103 F. 2d. 495 (5th Cir. 1939). The government has the burden of proving that each defendant charged with conspiracy had the criminal intent necessary to meet the requirements set forth in the substantive offense. United States v. Downen, 496 F. 2d. (10th Cir. 1974). In the case at bar, the government had the burden of proving that the Appellants had an intent to defraud. Thus, the state of mind of the Appellants was material, relevant and probative on the issue of intent to defraud and any evidence which was probative as to this element of the alleged crime was therefore admissible.

The state of mind of the Appellant William Rodman was clearly an issue in the case. In addition to the question of whether he had an intent to defraud,there was an issue of whether he was acting wilfully. A defendant's role in a conspiracy must be voluntary. United States v. Watson, 466 F. 2d. (5th Cir. 1972). The only witness to testify against Rodman was Kenneth Noonan,

the government informer who Rodman allegedly attempted to induce to act as a broker in the fraudulent sale of Franklin Properties stock to his customers. Noonan testified on cross examination that in 1973 he attempted to collect a debt from Rodman by threatening him with a gun. That he felt cheated by Rodman and had animosity against him (T. Pg 95-97, 109, 127-129). He further testified that at the time in November and December, 1975, that he was discussing the Franklin Properties stock transaction with Rodman he knew that he was going to be a government witness against Rodman in a pending criminal case in the United States District Court for the Southern District of New York and that Rodman knew he was going to be a witness. Noonan also testified that he knew his testimony would be damaging to Rodman and that he discussed the pending criminal case with Rodman and Rodman was gravely concerned. ( T. Pg. 98-101).

Rosemary Rodman, wife of the Appellant Rodman was called as a defense witness. She testified that in November, 1975, she overheard a telephone conversation between her husband and a person he referred to as Ken. She testified that her husband seemed very concerned or upset and seemed nervous (T. Pg. 558-559). The defense then offered the conversation between the witness and Appellant Rodman which took place immediately following the phone

conversation. The testimony was offered to show the Appellant Rodman's state of mind. The court held that the conversation was inadmissible and the defense excepted to the court's ruling (T. Pg. 556).

On December 1,1975, Mrs. Rodman received a phone call from and individual who identified himself as Ken Noonan. The phone conversation was objected to as Mrs. Rodman couldn't identify the voice of the caller and this objection was sustained (T. Pg. 558-559). Mrs. Rodman then testified that she called her husband in Binghamton, New York and told him that she had given the Binghamton telephone number to a person who identified himself as Ken Noonan. The witness was then asked "What did your husband say to you at that time? "An objection by the government was sustained. (T. Pg. 559-560). Mrs. Rodman's testimony would have been relevant and probative as to Rodman's state of mind and the issues of whether he had a criminal intent and whether he was acting wilfully.

Under applicable principles of law it is evident that the witness should have been permitted to testify as to conversations with and statements made to her by Appellant Rodman as they illustrated his state of mind when he dealt with Ken Noonan.

Rule 803 (3) of the Rules of Evidence For United States Courts and Magistrates states:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness."
>
> "(3) Then existing mental, emotional, or physical condition.--A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent,plan, motive, design, mental feeling, pain, and bodily health), ----------."

The foregoing section of the Rules of Evidence for United States Courts codified the existing case law as it existed throughout the various United States Circuit Courts. This rule is applicable to the statements made by the Appellant Rodman to his wife immediately after the telephone conversation between the Appellant Rodman and Noonan and the conversation between the witness and Rodman when the witness called Rodman in Binghamton, New York and told him she gave his phone number to Noonan. Rodman's statements were admissible to show his state of mind.

As intent to defraud and wilfullness were both matters required to be proven by the government. Rodman's state of mind was in issue and the excluded evidence was relevant, material and probative as to Rodman's state of mind and clearly admissible pursuant to the Federal Rules of Evidence. Where state of mind is an essential element of the crime charged, state of mind testimony is admissible. United States v. Mazzei, 390 F. Supp. 1098, ( W.D. Pa.

1975); United States v. Brown, 490 F. 2d. 758 (D.C.D.C.1973); United States v. Biondo, 483 F. 2d. 635 (8th Cir.1973); United States v. Stirone, 311 F. 2d. 277 (3rd Cir. 1962); United States v. Di Carlo, 458 F. 2d. 358 (8th Cir.1972); Carbo v. United States 314 F. 2d. 718 (9th Cir. 1963): Rogers v. United States, 334 F. 2d. 83 (5th Cir.1964): United States v. Dellinger, 472 F. 2d. 340 (7th Cir. 1972).

The motivation and criminal intent or lack thereof behind Rodman's actions lie at the crux of this case. They are key elements in his conviction. The excluded testimony would have indicated that William Rodman did not possess the requisite criminal intent to defraud and that he did not act "willfully". In Oneonta Dress Co. v. N.L.R.B.,333 F. 2d. 1 (2nd. Cir. 1964) an employer's wife was not permitted to testify to conversations with her husband indicating that business losses and not anti-union animus motivated the employer's decision to terminate his business. The trial court dismissed state of mind as inapplicable. The review court held this exclusion to be error stating:

> "...the employer's state of mind, his motivation stood at the heart of the case and his conversations were clearly admissible to show it."(Italics Supplied)

In Haigler v. United States, 172 F. 2d. 986 (10th Cir. 1949) the court noted that wilfullness being an essential element of the offense charged, evidence showing or tending to show the lack

of it, is a defense and is admissible for that purpose. In the case at bar Rodman was convicted of having acted "knowingly and willfully." The witnesses' testimony tending to show lack of wilfullness was admissible under the Haigler holding.

The court in Miller v. United States, 120 F. 2d. 968 (10th Cir. 1941) held that where the belief of a person charged with fraud or the motive of his acts or conduct is material he may buttress his statement that he had no intent to defraud with testimony or relevant circumstances including conversations had with third persons tending to support his statement that he had no intent to defraud. It was error for the court to exclude the evidence as to Rodman's state of mind. It should have been admitted with a limiting instruction to the jury that the evidence was not to be considered as to the truth of the matters asserted but rather as bearing on the declarant's state of mind. United States v. Brown, Supra. The case of Nuttal v. Reading Co.,235 F. 2d.546 (3rd Cir.1956), is directly on point and holds that it is error to have excluded the testimony. William Rodman was prejudiced by the exclusion of the evidence as it was never adequately brought to the jury's attention that the Appellant Rodman operated under a particular state of mind which would have been probative of his innocence because of his lack of criminal intent including the wilfull intent to defraud.

In addition Rosemary Rodman's proposed testimony as to conversations had with and statements made to her by William Rodman were

admissible under still a different theory. The United States Supreme Court in Dutton v. Evans, 400 U.S. 74 (1970) stated:

> "The hearsay rule does not prevent a witness from testifying to what he has heard: it is rather a restriction on the proof of fact through extra judicial statements. From the viewpoint of the confrontation clause, a witness, under oath, subject to cross examination and whose demeanor can be observed by the trier of fact is a reliable informant not only as to what he has seen but also as to what he has heard." (Italics Supplied).

Thus,under the Dutton rationale Mrs. Rodman should have been permitted to testify as to what she heard William Rodman say and the exclusion of this testimony was error.

The court also erred excluding Mrs. Rodman's testimony as to her telephone conversation of December 1,1975 with an individual who identified himself as Ken Noonan. On cross examination Noonan was questioned about how he knew that Rodman would be in Binghamton, New York, on December 1,1975 and where he would be staying. Noonan answered that he did not remember. Noonan was then asked whether he called Rodman at his Spring Valley home to speak to him on December 1,1975 at 7:11 P.M. Noonan answered that he didn't remember. Noonan was then asked whether he recalled Rodman's wife answering the phone and he answered."I have spoken to his wife on the phone. I don't remember whether it was that day". He further testified that it might have been Mrs. Rodman who told him Rodman was in Binghamton and gave him the phone number but that he did not

remember.(T. Pgs. 82-84)

The exclusion of this testimony because of the voice identification problem was patently unreasonable because of the existence of evidence making it reliable. In addition to Noonan's testimony given under cross examination the Government Exhibit No. 2 is the home telephone bill of James Kenneth Noonan. An examination of this bill reveals that on December 1,1975, when Rodman was in Binghamton, New York, a call was placed to Rodman's home in Spring Valley and thereafter another call was placed by Noonan to Rodman in Binghamton, New York. This exhibit plus Noonan's own testimony which did not deny the possibility of a conversation with Rosemary Rodman on December 1,1975, concerning William Rodman's stay in Binghamton was circumstantial evidence from which a jury could reasonably infer that the witness had a conversation with Noonan on that date. Also, Appellant Rodman's Exhibit No. C is his telephone bill for the period in question and shows that at some time that evening after Noonan called Rodman's home there was a call from Rodman's home to the Appellant in Binghamton, New York. Thus, it was for the jury to decide based upon this circumstantial evidence whether or not the conversation of December 1,1975, took place between the witness and Noonan and thus the exclusion of the testimony relating to the conversation was error.

POINT NO.4

THE APPELLANTS WERE DENIED A FAIR TRIAL BY REASON OF THE TRIAL COURT ABUSING ITS DISCRETION AND ARBITRARILY PERMITTING THE GOVERNMENT REBUTTAL ON THE DAY FOLLOWING THE CONCLUSION OF THE APPELLANTS CLOSING ARGUMENT.

Local Rule 3.1 of the Rules of the United States Courts, States:

> "In criminal trials, after the closing of the evidence and unless the trial judge shall direct otherwise, the government shall make the first summation, followed by the defense, and the government will be accorded time for rebuttal."

Local Rule 3.1 of the Rules of the United States Courts does not deprive the trial judge of his discretion to determine the order and extent of closing argument. His discretion in this regard is well established. United States v. Owens, 453 F. 2d. 355 (5th Cir. 1971). Also within the Court's discretion is the time of convening court and the timing and length of recesses. Carter v. United States, 373 F. 2d. 911 (9th Cir. 1967); Baumel v. Travelers Ins. Co. , 279 F. 2d. 780 (2d. Cir. 1960). The conduct of jury trials is largely confided to the district judge who is expected to have and exercise trial skill of the highest order and a wise and just discretion. Scott v. United States, 263 F. 2d. 398 (5th Cir. 1959). This is so because the trial judge is the only disinterested lawyer connected with the proceeding and his only interest is to see that justice is done. He must be assiduous in performing his function as governor of the trial

and must act dispassionately, fairly and impartially. Pollard v. Fennel, 400 F. 2d. 421 (4th Cir. 1968). The trial judge is affirmatively charged with the obligation of securing a fair trial. Justice does not depend on legal dialectics so much as upon the atmosphere of the court room and that in the end depends primarily upon the trial judge. Brown v. Walter, 62 F. 2d. 798 (2d. Cir. 1933).

In the absence of a manifest abuse the manner in which a trial judge exercises his discretion will not be disturbed. Carter v. United States, Supra. However, the action of the trial judge in the case at bar in permitting the prosecution to make its rebuttal argument on the day following the close of both the prosecution and defense closing summations was an arbitrary abuse of discretion which had no basis in the orderly conduct of the trial, had the effect of neutralizing the impact of the closing arguments of defense counsel and of highlighting the government's rebuttal so that the jury entered upon its deliberations with the words of the prosecutor ringing in their ears while the passage of over seventeen hours and a nights sleep had dimmed the arguments of the defense and reduced them to mere shadows.

The discretion of the trial judge must always be exercised to insure a fair trial. In exercising his discretion, due respect

for the reasonable needs and strategies of counsel is essential in the allotment of time for argument and recess. Federal Jury Practice and Instructions, Devitt and Blackmar, Section 5.01 page 95. As a matter of strategy, experienced trial counsel are well aware of the advantage of closing last and of having the right to rebut. The opportunity to rebut on the day following the last closing argument of defense counsel is an obvious tactical advantage. This should occur only if the orderly conduct of the trial cannot otherwise be assured. The trial judge who is expected to have andexercise trial skill of the highest order should have taken into consideration the tactical advantage he was giving the prosecution when, in his discretion, he recessed at a time which enabled the government to rebut the day following the completion of closing arguments and just prior to the commencement of the jury deliberations.

An examination of the trial transcript will illustrate that this action by the trial judge was a manifest abuse of discretion which interfered wi' and disrupted the strategy of the defense for the benefit of the prosecution and to the detriment and prejudice of the Appellants.

Closing arguments commenced at approximately 3:00 P.M. on March 29,1976. The trial judge assured all counsel that closing arguments and rebuttal would all be concluded on March 29,1976.

In fact, the trial judge admonished all counsel that "we had better finish the summations and rebuttal tonight" (T. pg. 611). Furthermore, the trial judge instructed the prosecution that its rebuttal should be brief. (T. Pg. 566-568). Defense counsel was concerned as a matter of strategy that closing arguments and rebuttal should be concluded on March 29th. (T. Pg. 611).

The government's closing argument was followed by the closing argument of counsel for the Appellant Rodman. Counsel for the Appellant Rosenberg asked the court whether the jury might stretch for one moment. The request was denied (T. Pg. 640). Counsel for the Appellant Rosenberg thereupon made his closing argument to the jury. It was approximately 6:15 P.M. when he concluded. All that was left was the government's rebuttal. It was at this point that the Court, without advising the jury of the brief nature of the rebuttal, asked the jury whether they would prefer to wait for morning to hear the government's rebuttal. The jury answered in the affirmative and over objection of defense counsel, rebuttal was scheduled for the following day. (T. Pg. 673-679).

The following day, seventeen hours after the last defense closing argument, the government made its lengthy and impassioned rebuttal argument. As a result, the jury entered deliberations with the government's words ringing in their ears.

In view of the fact that it was only 6:15P.M. when defense

counsel had completed their summations and in light of the trial judge's admonitions that the prosecutor's rebuttal should be a "very short rebuttal", the prejudice suffered by the Appellants as a result of the Court's decision to recess and have rebuttal the following day had no reasonable explanation in fact. It certainly was not the exercise of trial skill of the highest order and a wise and just discretion exercised by one whose only interest is to see that justice is done. Pollard v. Fennel, Supra. The jury at a crucial time was discharged at the comparatively early hour of 6:15 P.M. For the sake of a mere ten or fifteen additional minutes no prejudice would have accrued to the Appellants. The jury cannot be condemned for wanting to return home early. They are not trained in the law nor do they possess the expertise necessary to grasp what strategy, tactics and timing mean to a trial. The trial judge however, whose duty it is to supervise the conduct of a trial and who is trained in the law abused his discretion by leaving the decision to recess to the vote of the jury instead of weighing the various considerations such as the reasonable needs and strategies of counsel and unnecessary prejudice to the Appellants or advantage to the government and then exercising his discretion in a manner to insure justice and a fair trial. The trial court's action was both a surrender of his discretion and abuse thereof which resulted in prejudice to the Appellants and the denial of a fair and just trial.

POINT NO. 5

BY DISCUSSING THE TRUTHFULNESS OF KEN NOONAN'S TESTIMONY WITH THAT WITNESS WHILE HE WAS STILL UNDER OATH AND STILL SUBJECT TO CROSS EXAMINATION, THE PROSECUTOR FAILED IN HIS DUTY TO REFRAIN FROM IMPROPER METHODS CALCULATED TO PRODUCE A WRONGFUL CONVICTION AND TAINTED THE ENTIRE TRIAL

During luncheon recess, John Lowe, the Assistant United States Attorney trying this case, had a conversation with the witness Ken Noonan concerning the truthfulness of his testimony during cross examination by counsel for Rodman. At the time of this conversation the witness was still under oath and still subject to cross examination. On redirect Noonan admitted that at least part of his conversation with Mr. Lowe dealt with the subject of truth. Counsel for both Rodman and Rosenberg moved for a mistrial but these motions were denied. The defense counsels then requested an instruction to the jury concerning the impropriety of an attorney speaking to a witness still subject to examination during a recess. The court decided to make no mention of this and ordered the jury brought in. The trial then continued.

The prosecutor's conduct violated every fundamental principle of truth seeking and fair play inherent in our judicial system. If Mr. Lowe felt that Mr. Noonan's testimony was evasive or untruthful it was his duty as a representative of the government to bring this to the trial judge's attention. It is important to

note that had the defense counsel not observed this conversation it would never have been brought to light.

Ordinarily failure to object to the prosecutor's conduct will bar later relief United States v. Donovan 339 F. 2d. 404 (7th Cir. 1964) and harm to the defendant may be avoided in some cases by curative instructions from the court. Clark v. United States, 391 F. 2d. 57 (8th Cir. 1968). In the case at bar, the defense counsel objected, moved for a mistrial and then requested a curative instruction on the subject.

If the prosecutor indulges in misconduct of a substantial nature that interferes with the defendant's right to a fair trial, a new trial must be ordered. Evalt v. United States, 359 F. 2d. 534 (9th Cir. 1966), United States v. Spangelet 258 F. 2d. 338 (2nd Cir. 1958). Mr. Lowe's conduct deprived the Appellants of a fair trial. Ken Noonan was the government's key witness and any problems Mr. Lowe encountered with the truthfulness of his testimony should have been brought to the trial court's attention as a trial is a search for truth not convictions. No man can say what the actual content of that conversation was. It may have amounted to prompting or Noonan might have interpreted it to mean that Mr. Lowe wanted him to say certain things. Regardless of the content of this conversation it so violated fundamental principles of which Mr. Lowe was obviously acquainted as to taint the entire trial.

The trial judge stated that Mr. Lowe had no right to do what he did (T. Pg. 246) and added:

> "...I do have that proposition that you do not talk to the witness when he is under cross examination.... That is fundamental, you know that" (Italics Supplied) (T. Pg. 253-254)

As a result of this conduct by the prosecutor, it became necessary for the prosecutor to illicit upon redirect of the witness the content of his conversation with the witness. This indirectly placed the prosecutor's credibility in issue and therefore, placed in a better light the credibility of the witness who in effect, had transferred to him the benefit of the prosecutor's credibility in the eyes of the jury. As the witness was the main government witness, this transference of credibility from the prosecutor to the witness prejudiced the Appellants.

As The United States Supreme Court in Berger v. United States 295 U.S. 78 (1935) so aptly stated:

> "The United States Attorney is the representative not of an ordinary party to a controversey, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.. while he may strike hard blows, he is not at liberty to strike foul ones. It is his duty to refrain from improper methods calculated to produce a wrongful conviction....."

## CONCLUSION

For the above stated reasons the judgment should be reversed.

Respectfully submitted,

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